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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 04-20
Table of Allotments,)	RM-10842
FM Broadcast Stations)	RM-11128
(Cambridge, Newark, St. Michaels, and Stockton,)	RM-11129
Maryland and Chincoteague, Virginia))	RM-11130

To: The Secretary
Attn: Media Bureau

ORIGINAL

PETITION FOR RECONSIDERATION

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SUMMARY

In this Petition for Reconsideration, CWA Broadcasting, Inc., licensee of WINX-FM, Cambridge, Maryland, demonstrates that the Media Bureau's decision denying CWA's petition to modify WINX's community of license to its original community of license, Cambridge, Maryland, and to upgrade its operation to Class B1 on Channel 232, and instead allotting Channel 235A to Newark, Maryland and Channel 233A to Chincoteague, Virginia in response to counterproposals submitted by MTS Broadcasting, L.C. and Dana Puopolo, respectively, is arbitrary and capricious and must be reversed.

In its decision, the Bureau erroneously found that Newark, Maryland qualifies as a bona fide community for allotment purposes. As demonstrated herein, that determination has no basis in law or fact, and should therefore be reversed.

Further, in light of the extraordinary circumstances involving the Station's community of license and the fact that, as a practical matter, both CWA and the Commission have treated Cambridge, rather than St. Michaels, as WINX's community of license, the Bureau should have granted CWA's Cambridge Proposal. Additionally, to the extent the Bureau's decision relied upon an erroneous assumption concerning the technical feasibility of an upgrade from Channel 232A to Channel 232B1 at St. Michaels, Maryland, the decision should be reconsidered.

Finally, if the Commission's allotment priorities are deemed to prevent reallocation of Channel 232B1 to Cambridge, in the alternative, the public interest and the Commission's allotment priorities will best be served by changing WINX's community of license to Oxford, Maryland and allotting Channel 232B1 thereto.

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PETITION FOR RECONSIDERATION

CWA Broadcasting, Inc. ("CWA"), the licensee of Station WINX-FM, Cambridge, Maryland (the "Station" or "WINX"), by its attorneys and pursuant to Section 1.429(a) of the Commission's Rules, hereby submits this petition for reconsideration of the decision of the Media Bureau ("Bureau") in the above-referenced proceeding,¹ in which the Bureau denied CWA's petition to modify WINX's community of license to its original community of license, Cambridge, Maryland, and to upgrade its operation to Class B1 on Channel 232 (CWA's Cambridge Proposal"), and instead allotted Channel 235A to Newark, Maryland and Channel 233A to Chincoteague, Virginia in response to counterproposals submitted by MTS

¹ *Cambridge, Newark, St. Michaels, and Stockton, Maryland and Chincoteague, Virginia*, Report and Order, DA 05-3101, released December 2, 2005 ("R&O"). This Petition for Reconsideration is timely filed within 30 days of publication of a summary of the R&O in the Federal Register, 70 Fed. Reg. 75744 (December 21, 2005).

Broadcasting, L.C. ("MTS"), licensee of Station WCEM-FM, Cambridge, Maryland, and Dana Puopolo ("Puopolo"), respectively.² In support thereof, CWA states as follows.

Introduction

In the *R&O*, the Bureau erroneously found that Newark, Maryland qualifies as a bona fide community for allotment purposes. As demonstrated herein, that determination has no basis in law or fact, and should therefore be reversed. Further, in light of the extraordinary circumstances involving the Station's community of license and the fact that, as a practical matter, both CWA and the Commission have treated Cambridge, rather than St. Michaels, as WINX's community of license, the Bureau should have granted CWA's Cambridge Proposal. Given these factors, the public interest in maintaining a rational and fair administrative process requires the allotment of Channel 232B1 to Cambridge and trumps any other application of the Commission's allotment priorities to the case at hand. In the alternative, the public interest and the Commission's allotment priorities will best be served by changing WINX's community of license to Oxford, Maryland and allotting Channel 232B1 thereto.

I. THE BUREAU ERRED IN DETERMINING THAT NEWARK, MARYLAND QUALIFIES AS A COMMUNITY FOR ALLOTMENT PURPOSES

In the *R&O*, the Bureau attempted to justify its determination that Newark, Maryland qualifies as a community for allotment purposes on two grounds. First, the Bureau cited the Commission's general presumption that "if a community is incorporated or listed in the U.S. Census, the community qualifies for FCC allotment purposes." *R&O* at ¶ 3 (citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982)). Second, the Bureau cited

² Route 12 Community Broadcasters ("Route 12") also filed a counterproposal to allot Channel 232A to Stockton, Maryland. The Bureau denied Route 12's counterproposal. Puopolo filed a separate petition for rulemaking prior to the deadline for comments in the Cambridge proceeding, which the Bureau processed as a counterproposal due to its mutual exclusivity with the counterproposals of MTS and Route 12. See *R&O* at ¶ 1, n. 3.

one case, *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcasting Assignments (Semora, North Carolina)*, 5 FCC Rcd 934 (1990) ("*Semora, North Carolina*"), as precedent for the acceptability of Newark as a legitimate community of license. In reaching its faulty decision, the Bureau misapplied Commission precedent and ignored the substantial evidence submitted on the record by CWA.

In Reply Comments filed on April 20, 2004, and in an Opposition to MTS's Supplemental Comments filed on July 9, 2004 ("Opposition"), CWA acknowledged that, under Commission precedent, designation of an area as a CDP (or if the area is incorporated) raises the presumption that the area constitutes a community for allotment purposes ("CDP presumption"). *See Grants and Peralta, New Mexico*, 14 FCC Rcd 21446, 21449 (MMB 1999). However, as CWA pointed out in its in-depth analysis of the Commission's community allotment standards and its extensive factual demonstration of Newark's inadequate community attributes thereunder, the CDP presumption may be rebutted upon a showing, as here, that despite an area's CDP status, it does not possess the social, economic, or cultural characteristics that inform the Commission's definition of a "community" for allotment purposes. *See id.*; *Stock Island, Florida*, 8 FCC Rcd 343 (MMB 1993); *East Hemet, California et al.*, 4 FCC Rcd 7895 (MMB 1989). In the *R&O*, the Bureau failed even to acknowledge the conditions under which the CDP presumption could be rebutted. More importantly, the Bureau entirely ignored the substantial evidence provided by CWA to rebut the presumption that Newark is a bona fide community and to demonstrate the fatal flaws in MTS's attempt at a community showing. Having erred in its handling of the CWA showing, the grant of the Newark allotment must be reversed.

In its Opposition, CWA set forth the results of its investigations into various claims made by MTS concerning Newark's status as a community, including the findings of one of CWA's

engineering consultants who personally visited Newark in order to witness firsthand the alleged community attributes of Newark. *See* Opposition and Report, Attachment 1 thereto. The findings reported in the Opposition wholly discredited MTS's claims and demonstrated that the allegedly independent "Newark" institutions, organizations and businesses submitted by MTS in fact failed to constitute the social, economic and cultural indicia of a community.³ Under established Commission precedent, the failure of a petitioner to demonstrate that institutions, businesses and other organizations identify with a particular community is grounds for rejecting a community as suitable for allotment purposes.

For instance, the Commission has rejected places such as Peralta, New Mexico, despite Peralta's listing as a CDP, a population of 3,182 persons, its own zip code, a listed post office, volunteer fire department, and numerous local establishments. *See Grants and Peralta, New Mexico, supra*. The factors the Commission relied upon to reject Peralta also apply (and more so) to Newark: no exclusive post office (despite an independent zip code), no school system or hospital, large portion of residents working outside the area,⁴ no local government or elected

³ For example, the post office that MTS claimed served only Newark, with its 135 households, in fact is a regional facility that delivers mail to approximately 1,200 mailboxes throughout the surrounding area. *See* Opposition at 2, Report at 1-2. (In any event, as pointed out in the Reply Comments and the Opposition, the Commission has held that the mere presence of a post office is not enough to demonstrate the existence of a bona fide community. *See Rockport, Texas et al.*, 4 FCC Rcd 8075, 8076 (1989) (fact that Armstrong, Texas had its own post office not enough to establish Armstrong as community)). Also, the "Newark Fire Department," cited by MTS to demonstrate Newark's independent community status, is a "volunteer" fire department serving "primarily a rural, 50 square mile area," is regularly manned by one individual who is normally there only three days per week and most of whose volunteer equipment drivers are from outside Newark. *See* Opposition at 3, Report at 2. And "Newark Station," identified by MTS as Newark's grocery store, is in fact primarily a gas station with an ancillary food service operation, the kind of gas station that is peppered throughout rural areas. *See* Opposition at 3-4, Report at 3.

⁴ *See* Exhibit E to Reply Comments (average commute time of persons residing in Newark is 32.1 minutes). *See also Danville and Nonesuch, Kentucky*, 18 FCC Rcd 9304, 9306 (MMB 2003).

officials, no municipal services, no local media, no civic or social organizations, and no separate listing for residents and businesses in the telephone book.⁵ See Reply Comments at 2-3, 6-8; Opposition at 2-5. See also *Grants and Peralta, New Mexico, supra*; *Stock Island, Florida, supra* (rejecting Stock Island as a community despite its CDP status and presence of volunteer fire department, businessman's association, and neighborhood improvement program, because petitioner failed to demonstrate that any of the business, political, social or commercial organizations identified themselves with Stock Island); *East Hemet, California, et al., supra* (rejecting East Hemet as a community because petitioner failed to demonstrate that East Hemet had the social, economic or cultural indicia qualifying it as a community for allotment purposes).

As set forth in CWA's Opposition, under the standards established in the above-cited cases, the evidence presented by MTS to show that Newark is a community instead demonstrates that it is an "expanded rural area" without the social, economic, or cultural indicia warranting an allotment. See *Broadview, Montana*, 14 FCC Rcd 14101 (1999) (rejecting Broadview as a community where petitioner failed to demonstrate that listed establishments were "intended to serve Broadview, as opposed to an expanded rural area"). The rural character of Newark is confirmed over and over again, by (i) the low density population, (ii) by the signs posted every mile along Route 113, the main road through the area, urging drivers to use their headlights during the day on account of two-way traffic: "Avoid the Fine – Two-Way Traffic – Use

⁵ As pointed out in CWA's Opposition, MTS claimed in its Supplemental Comments that unlike Peralta, Newark has a separate listing in the phone book for its residents and businesses. See MTS's Supplemental Comments at 3, Exhibit H. This argument is belied by MTS's own evidence. While residents of Newark are identified as such, they are part of a general listing for Somerset-Worcester Counties. Newark does not have a separate listing as a community within the larger phone book and no separate phone book of its own.

Headlights,” and (iii) the very nature of the businesses and establishments cited by MTS,⁶ which have no particular nexus to Newark, but rather serve the surrounding areas of which Newark is simply a part. *See* Opposition at 5, Report at 1; *see also Gaviota, California*, 16 FCC Rcd 1518, 1522 (2000) (rejecting Gaviota as a community where petitioner failed to demonstrate nexus between establishments and the community in question). Newark’s lack of the important social, economic, and cultural attributes that define a community rebuts any presumption that, as a CDP, it qualifies as a bona fide community. MTS’s counterproposal should therefore have been rejected on grounds that MTS failed to provide evidence that Newark qualifies as a community for allotment purposes.

In the *R&O*, the Bureau did not even acknowledge – let alone analyze, weigh or consider – the extensive factual evidence provided by CWA to refute Newark’s status as a community for allotment purposes. Such disregard of important record evidence hardly qualifies as competent agency decision-making. The Commission has previously set aside decisions that “ignored record evidence relevant to the issues designated for investigation and lacked sufficient

⁶ In addition to the Newark Station, discussed in the preceding footnote, MTS cited the Worcester County Solid Waste Facility, the Queponco Railway Station, Mary Lou’s Assisted Care facility, the Worcester Career and Tech Center, and three churches as indicia of Newark’s community status. As demonstrated in the Opposition, none of the establishments support the independence or community attributes of Newark. The Worcester County Solid Waste Facility is a garbage dump that serves the County generally, not Newark specifically. It is located outside the Newark CDP – the very fact that Worcester County has chosen to locate its garbage dump near Newark confirms the rural character of the area. *See* Opposition at 6. Similarly, the Worcester Career and Tech Center serves the County rather than Newark, and is itself located outside the Newark CDP. *See id.*, Report at 4. Mary Lou’s Assisted Care Facility is a private residence (expanded upon to provide assistance to up to four elderly people), a fact consistent with the absence of any commercial presence in Newark. *See id.* The Queponco Railway Station is not operational and functions as a museum with very limited hours (3 hours, two days a month, six months of the year). *See id.* Finally, by MTS’s own admission, 50% of the attendees of two out of three of the churches allegedly serving Newark reside outside of the Newark CDP. *See* MTS’s Supplemental Comments at 6.

analytical foundation for the findings reached," and must do so here. *Western Union Telegraph Company*, 95 FCC 2d 881, 920 (1983).

Similarly, in the *R&O*, the Bureau did not bother to mention – let alone address or distinguish – any of the cases cited by CWA,⁷ choosing instead to accept Newark as a bona fide community on the sole basis of a cursory comparison with *Semora, North Carolina*, a two-page decision from 1990 (prior to the cases relied upon by CWA) establishing *Semora, North Carolina* as a legitimate community for allotment purposes. The Bureau summarized the purported relevance of *Semora, North Carolina* as follows:

In that case, the Commission found that *Semora* was a community even though *Semora* was not listed in the census reports, had an estimated population of only 150, had no local government, and provided no municipal services except for its volunteer fire department. That case noted that even though residents relied on the county to provide police and schools, there could be any number of reasons as to why such services are provided on a county-wide basis as opposed to a local basis.

R&O at ¶ 3. In reducing the extensively fact-based issue of Newark's community status to this tidy case snapshot, not only did the Bureau arbitrarily and capriciously dismiss many pleadings' worth of relevant record evidence, it also failed to identify decisionally-significant factors in *Semora, North Carolina* notably absent from the instant proceeding.

According to the Commission in that case, if, like *Semora* (and unlike Newark), "a community is not incorporated or listed in census reports, the proponent of an allotment must show the place to be a geographically identifiable population grouping," which may be "proven by the testimony of local residents *or* by objective indications of the existence of a common perception that a locality's populace constitutes a distinct geographical population grouping." 5

⁷ The relevant cases cited by CWA and completely ignored by the Bureau include: (1) *Grants and Peralta, New Mexico, supra*; (2) *Stock Island, Florida, supra*; (3) *East Hemet, California, et al., supra*; (4) *Rockport, Texas et al., supra*; (5) *Broadview, Montana, supra*; (6) *Gaviota, California, supra*; and (7) *Danville and Nonesuch, Kentucky, supra*.

FCC Rcd at 934 (internal citations omitted). The proponent in *Semora, North Carolina* submitted "receipts from local businesses giving an address of Semora and photographs of local churches," evidence of "several stores, two restaurants and a night club," as well as a "petition signed by a number of individuals attesting to their belief that Semora is a community," and "letters...from the Caswell County Chamber of Commerce, the Semora Ruritan Club, the Semora Volunteer Fire Department, and the County Manger of Caswell County, all of which support the contention that Semora is a community." *Id.* at 934-935. After carefully examining the evidence submitted on the record, the Commission concluded that "the objective indica of community status, along with the subjective views expressed in the letters and petition, are sufficient to prove that Semora is a community for allotment purposes." *Id.* at 935.

Semora, North Carolina hardly lends support to the Bureau's position in the *R&O*; rather, that case reveals the fundamental flaws contained in the instant decision and reinforces the need for its immediate reversal. The evidence presented by the proponent in *Semora, North Carolina* – particularly the extensive testimony of local residents – vastly outweighs that presented by MTS in the instant proceeding. Likewise, the opponents in *Semora, North Carolina* failed to counter the proponent's evidence, whereas in the instant proceeding CWA effectively discredited MTS's exaggerated claims of Newark's community status with direct evidence, including the statement of a party who personally visited Newark. Finally, the Commission in *Semora, North Carolina* took into account and analyzed the evidence on the record piece-by-piece, whereas in the *R&O* the Bureau disregarded CWA's record evidence and chose to forego any analysis, relying instead upon a poorly-considered citation to an unsupportive case.

Upon proper consideration of Commission precedent, and in view of the substantial evidence provided by CWA in the proceeding below, it is clear that Newark, Maryland lacks the

social, economic and cultural elements that comprise a community. As set forth above, the Bureau's decision to the contrary is arbitrary and capricious and must be reversed. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Am. Tel. and Tel. Co. v. FCC*, 974 F.2d 1341, 1354 (D.C. Cir. 1992) (agency acted arbitrarily and capriciously by failing to provide reasoned explanation supported by record).

II. THE BUREAU ERRED IN REFUSING TO ALLOT CHANNEL 232B1 AT CAMBRIDGE, MARYLAND

A. The Bureau Should Have Maintained the Station's Community of License at Cambridge, Maryland

In the *R&O*, the Bureau rejected CWA's Cambridge Proposal because, according to the Bureau, the change in community of license to Cambridge would not result in a preferential arrangement of allotments,⁸ as "[r]etaining Channel 232A at St. Michaels would provide that community with its first local aural transmission service under priority (3) of the FM allotment priorities, while moving Channel 232B1 to Cambridge would trigger priority (4) of the FM allotment priorities..." *R&O* at ¶ 5. However, the extraordinary circumstances of CWA's history with the Cambridge and St. Michaels allotments, and the fact that both CWA and the Commission have consistently treated Cambridge, rather than St. Michaels, as the Station's community of license, require that the Bureau forego strict application of the Commission's

⁸ The Commission reviews petitions to amend the FM Table of Allotments according to its FM allotment priorities, and requires that proposed reallocations result in a preferential arrangement of allotments thereunder. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("Community Modification Reconsideration"). The Commission's FM priorities, as set forth in the *Revision of FM Assignment Policies and Procedures*, *supra*, 90 FCC 2d at 91-92, include: (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. The Commission gives co-equal weight to priorities (2) and (3). *Id.*

allotment priorities and maintain the Station's community of license as Cambridge as a matter both of equity and fair and rational administrative process.

As set forth by CWA in prior pleadings, certain facts, raised previously by CWA in connection with the Petition for Rulemaking it filed in 1992 requesting a change in the Station's community of license from Cambridge to St. Michaels ("Original Petition"),⁹ and in connection with its subsequent efforts to dismiss that proceeding, bear significantly on the instant proceeding. CWA filed the Original Petition due to problems it faced in securing zoning that would permit the construction of an antenna supporting structure for the new Station. CWA could not find a location that would allow the construction of a tower that would result in compliance with the requirements of Section 73.315 for the minimum field strength of the Station's signal over its community of license, Cambridge, Maryland. Since there was available to CWA an existing tower in the vicinity of St. Michaels that would enable CWA to meet the field signal strength requirement at St. Michaels, but not Cambridge, CWA filed the Original Petition seeking a change in the Table of Allotments and the Station's community of license. Thus, tower availability, rather than local service considerations, underpinned CWA's submission of the Original Petition.

The requested changes were denied by the former Mass Media Bureau, both initially and on reconsideration. *See Report and Order* in MM Docket No. 92-291, 9 FCC Rcd 2767 (1994), *recon. denied*, 10 FCC Rcd 8080 (1995) (denying requested reallocation because CWA had received in a comparative hearing a "decisionally significant preference that would not have been granted had the comparative contest been for a station at the new proposed community"). On application for review, however, the Commission reversed the Bureau and granted CWA's

⁹ MM Docket No. 92-291, RM-8133.

request for the change in community of license from Cambridge to St. Michaels. *Memorandum Opinion and Order* in MM Docket No. 92-291, 12 FCC Rcd 3504 (1997) (accepting and granting the reallocation proposal based upon CWA's qualitative enhancements vis-à-vis St. Michaels and given that the reallocation resulted in preferential arrangement of allocations).

During the five years that the case progressed from the filing of the Original Petition to final decision by the Commission, circumstances changed materially regarding the availability of an antenna supporting structure for CWA. CWA was able to secure zoning for a transmitter site south of Trappe, Maryland, located roughly halfway between Cambridge and St. Michaels. This structure allowed CWA to provide the requisite signal field strength over Cambridge. On January 9, 1997, the Commission granted CWA a construction permit (File No. BMPH-19960701IB) for this site. The Station was constructed, received a license with Cambridge indicated as the community of license (File No. BLH-19990715KB) and is currently operating from the Trappe site.

Taking into consideration the January 9, 1997 grant of the modification of the Station's construction permit, CWA, in April 1997, submitted to the Commission a Petition for Clarification ("Clarification Petition"). Therein, CWA explained that circumstances had changed and that CWA no longer required the change in community of license since the Station was now serving Cambridge. No action was taken by the Commission in connection with the Petition for Clarification, and CWA neither modified its license to specify St. Michaels as the Station's community of license, nor constructed a facility to serve St. Michaels.

In July 2002, CWA filed a Petition to Dismiss seeking dismissal of the Original Petition proceeding based on its position that the Petition for Clarification was a petition for reconsideration of the allocation changes and that there was no reason for the changes to be

made. Through its Petition to Dismiss, CWA sought to return to the FM Table of Allotments status quo with Cambridge as the Station's community of license, and thereby to permit upgrade of the Station to a Class B1 facility in accordance with CWA's modification application currently pending before the Commission (File No. BPH- 20020718ABE). In *Cambridge and St. Michaels, Maryland*, 17 FCC Rcd 20425 (MB 2002) ("Order"), the Bureau denied CWA's Petition to Dismiss, rejecting CWA's claim that the Original Petition remained pending in light of CWA's Petition for Clarification and the Commission's non-treatment thereof. The Bureau stated instead that "[a]t this juncture, the appropriate procedure would be for CWA Broadcasting to file a petition for rule making proposing the reallocation of Channel 232A back to Cambridge." *Id.*

Relying upon the recommendations of the Bureau contained in the Order, CWA promptly filed a Petition for Rulemaking requesting that the Commission issue a notice of proposed rulemaking proposing modification of the Station's community of license from St. Michaels to Cambridge. And, as the upshot to all of CWA's various efforts to clarify and finalize the Station's community of license issues, in the *R&O*, the Bureau promptly disregarded the long history of CWA's efforts, and wrongfully rejected CWA's Cambridge Proposal, including CWA's request to remain licensed to Cambridge, the Station's original community of license.

CWA submits that, in light of the extraordinary circumstances surrounding the Station's efforts to obtain a suitable and final community of license, the Bureau should have conformed the FM Table of Allotments to the Station's current broadcast practice – what CWA proposed in its comparative hearing and what the FM Table of Allotments previously had been – by officially reinstating Cambridge as the Station's community of license. The Commission itself has never changed the Station's community of license in its own database – the CDBS database continues

to evidence Cambridge, not St. Michaels, as the Station's community of license. In fact, the most recent Station renewal issued by the Commission lists Cambridge as the Station's community of license. *See* File No. BRH-20030530ADC. Because no license issued for the St. Michaels facility, and because that facility was never constructed, the Bureau correctly refrained from invoking the Commission's "no removal" policy.¹⁰ However, the Bureau erred in refusing to acknowledge the practical treatment of Cambridge as the Station's community of license on the parts of both CWA and the Commission, and in failing to give appropriate weight to this fact when considering CWA's request to formally and finally establish Cambridge as the Station's community of license.

Further, the history of these proceedings and the logic underpinning the various twists and turns CWA has taken support the return of the Station to Cambridge. Given the initial difficulties surrounding CWA's request to move to St. Michaels, the resolution of those difficulties, CWA's resulting efforts to apprise the Commission of the Station's circumstances and to formalize Cambridge as the Station's community of license, the public interest in a fair and rational administrative process necessitates the return of the Station's community of license

¹⁰ In connection with its allotment priorities, the Commission prohibits the removal of a community's sole local service on grounds that such a change presumptively disserves the public interest. *See Community Modification Reconsideration*, 5 FCC Rcd at 7096. However, as the Commission itself has determined, removal of an unconstructed station from a community does not present the same concerns as the loss of service represented by the removal of an operating station. *See Sanibel and San Carlos Park, Florida*, 10 FCC Rcd 7215 (1995); *Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657 (1993); and *Glencoe and LeSueur, Minnesota*, 7 FCC Rcd 7651 (1992). In the case of an unbuilt Station, the community has not experienced service and or developed reliance thereon, therefore reallocation of the unbuilt Station cannot be construed as a loss, and the "no removal" rule need not be applied. *Id.* Because CWA never built the Station as a St. Michaels station, removal of the Station from St. Michaels is not prohibited under the Commission's allotment priorities. Furthermore, the Commission has stated that in "rare circumstances where removal of a local service might serve the public interest" it will "entertain requests to waive the prohibition" on removing a community's sole local service. *Community Modification Reconsideration*, 5 FCC Rcd at 7096.

to Cambridge. The respective public benefits of the Cambridge and St. Michaels allotments are comparable enough that the Media Bureau preferred the Cambridge allotment in creating the FM Table of Allotments as well as throughout the Original Petition proceeding. Given such a fine distinction between the allotment preferences of St. Michaels and Cambridge, the substance behind the various proceedings should have trumped strict process and tipped the scales in favor of Cambridge. Once again, as a matter of historical record, the Commission reversed the Bureau and changed the Station's community of license to St. Michaels only at a point when that modification was no longer necessitated by technical considerations and thus no longer in furtherance of the public interest in optimal broadcast service. Further, as demonstrated above, CWA has practically operated WINX with Cambridge as the Station's community of license, an operation recognized by the Commission and evidenced by the CDBS database and the Commission's own action on the Station's latest renewal. Thus, the current situation does not present an issue of allotment priorities between two communities so much as the opportunity to undo a reallocation that was not needed in the first place and was never carried out. It is a matter of reinstating an allotment that the Commission had already made. Under the circumstances of this unusual case, a return to the status quo, and not a strict application of the Commission's allotment priorities, is necessary and proper. The Bureau's decision to the contrary is arbitrary and capricious and must be overturned. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., supra; Am. Tel. and Tel. Co. v. FCC, supra.*

B. The Bureau Erroneously Relied upon the Feasibility of a Channel 232B1 Allotment at St. Michaels, Maryland

In rejecting CWA's Cambridge Proposal, the Bureau appears to have relied upon its unsubstantiated view of the technical feasibility of the upgrade from Channel 232A to Channel 232B1 at St. Michaels, Maryland, thereby assuming that CWA could operate a B1 facility at St.

Michaels and that the rulemaking change was not necessary. *See R&O* at ¶ 5, n. 14. However, as set forth in the Engineering Statement attached hereto as **Exhibit 1**, the Bureau's assumption is clearly erroneous. As pointed out in the Engineering Statement,¹¹ based on the nearest available Channel 232B1 reference point to St. Michaels, the Station's 232B1 operation at St. Michaels would fail to comply with the Commission's city grade coverage requirements. *See* Engineering Statement at 1-2, Figure 1. Because a Channel 232B1 allotment is not possible at St. Michaels, the public interest would best be served by reallocating Channel 232B1 to Cambridge. As set forth in the Engineering Statement, and as previously set forth in the Petition for Rulemaking and the Engineering Statement attached thereto, CWA's Petition for Rulemaking and the Engineering Statement attached thereto, the upgrade of the Station to a Class B1 facility proposed by CWA would not diminish current service to St. Michaels. Instead, the proposed community change together with the proposed upgrade would result in a net service gain while improving the level of service to St. Michaels, and would thus better serve the public interest.

As demonstrated by CWA's Reply Comments, submitted on December 27, 2004, and the Engineering Statement attached thereto as Exhibit A, CWA's Cambridge Proposal would produce a net gain in service of 2,236 square kilometers and 99,186 persons, facts not discussed in the *R&O*. Included in this gain in service is service to underserved areas and populations. Exhibit A to CWA's Reply Comments shows that the total underserved gain area consists of 1,484 square kilometers and 57,339 persons. This consists of: (a) a second reception service to 1,106 persons in 276 square kilometers, (b) a third reception service to 4,536 persons in 283 square kilometers, (c) a fourth reception service to 3,915 persons in 283 square kilometers, and

¹¹ The technical flaws in the Channel 232B1 allotment at St. Michaels was previously pointed out in a Petition to Deny filed by WDAC Radio Company in MM Docket No. 92-291, RM-8133. *See* Order, *supra*.

(d) a fifth reception service to 47,782 persons in 642 square kilometers. Finally, as noted in Exhibit A to CWA's Reply Comments, the proposed change in the allotment will result in service by the Station to 168,095 persons in 2,744 square kilometers of land area. Given these public interest gains, the Bureau should have approved CWA's Cambridge Proposal.

III. CHANNEL 232B1 MAY BE REALLOTTED TO OXFORD, MARYLAND AS AN ALTERNATIVE TO CAMBRIDGE, MARYLAND

If, despite the arguments presented by CWA herein, the Commission's allotment priorities are deemed to prevent reallocation of Channel 232B1 to Cambridge, Maryland, CWA requests that the Commission approve the reallocation of Channel 232B1 to Oxford, Maryland (the "Oxford Proposal"). As demonstrated in the Engineering Statement, Oxford presents itself as a feasible alternate community of license for the Station's Channel 232B1 operation, utilizing the same reference point as Cambridge. *See* Engineering Statement at 2, Figure 2. Significantly, the Oxford Proposal includes all of the public interest gains of the Cambridge Proposal, including the provision of service to the underserved, with the added benefit of satisfying the Commission's third allotment priority, a first local service. *See Revision of FM Assignment Policies and Procedures, supra.*

Oxford readily qualifies as bona fide community for allotment purposes. Oxford is a Census-listed town with a population of 771 persons. *See Exhibit 2.* It has its own local government (**Exhibit 3**), its own post office and zip code (**Exhibit 4**) and its own volunteer fire department (**Exhibit 5**). Oxford hosts an "Annual Oxford Day" celebration (**Exhibit 6**), puts out the "Oxford Newsletter," (**Exhibit 7**) and is home to the Oxford Museum (**Exhibit 8**). Oxford also boasts the Oxford Community Center, featuring the productions of the Tred Avon Players, among others. *See Exhibit 9.* Finally, Oxford has its own Oxford Business Association, and is home to numerous local inns, restaurants, shops, churches and other organizations and

businesses. *See Exhibit 10.* The Commission has previously found substantially less community indicia sufficient to establish community status for allotment purposes. *See, e.g., Semora, North Carolina, supra; Encino, Texas*, 18 FCC Rcd 23984 (MB 2003); *Marathon and Mertzon, Texas*, 18 FCC Rcd 23986 (MB 2003).

Finally, CWA may submit the Oxford Proposal on reconsideration pursuant to Section 1.249(b)(1) of the Commission's Rules (allowing petitions for reconsideration which rely on facts not previously presented if such facts relate to events which have occurred or circumstances which have changed since the last opportunity to present them). The Commission has previously made changes to the FM Table of Allotments in reconsideration proceedings in order to better serve the public interest in a preferential allotment of broadcast frequencies. *See, e.g., Ash Fork, Arizona et al*, 19 FCC Rcd 6104 (MB 2004). This is certainly such a case.


Conclusion

As demonstrated above, in the *R&O*, the Bureau's determination that Newark, Maryland qualifies as a bona fide community for allotment purposes has no basis in law or fact, and should therefore be reversed. Further, in light of the extraordinary circumstances involving the Station's community of license and the fact that, as a practical matter, both CWA and the Commission have treated Cambridge rather than St. Michaels as WINX's community of license, the Bureau should have granted CWA's Cambridge Proposal. Given these factors, the public interest in maintaining a rational and fair administrative process requires the allotment of Channel 232B1 to Cambridge and trumps any routine application of the Commission's allotment priorities to the case at hand. In the alternative, the public interest and the Commission's allotment priorities will best be served by changing WINX's community of license to Oxford, Maryland and allotting Channel 232B1 thereto.

WHEREFORE, for the foregoing reasons, CWA Broadcasting, Inc. respectfully requests that the Commission reverse the decision of the Media Bureau denying CWA's proposal to modify Station WINX-FM's community of license from St. Michaels, Maryland to its original community of license, Cambridge, Maryland and upgrade its operation to Class B-1 on Channel 232, and instead allotting Channel 235A to Newark, Maryland in response to a counterproposal submitted by MTS Broadcasting, L.C., or, in the alternative, change WINX's community of license to Oxford, Maryland and allot Channel 232B1 to Oxford.

Respectfully submitted,

CWA BROADCASTING, INC.

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January 20, 2006

EXHIBIT 1

Engineering Statement
RESPONSE TO REPORT AND ORDER
prepared for
CWA Broadcasting, Inc.
WINX-FM Ch. 232B1 Cambridge, MD Facility No. 14774

Introduction

This Engineering Statement has been prepared on behalf of *CWA Broadcasting, Inc.* ("CWA") licensee of FM radio station WINX-FM, Channel 232A, which is licensed to Cambridge, MD¹, but whose channel is allotted to St. Michaels, MD (File Numbers BLH-19990715KB and BRH-20030530ADC). This Statement is presented as part of a response to a Report and Order ("R&O", DA 05-3101) wherein the Petition for Rule Making to reallocate Channel 232A from St. Michaels to Cambridge, Maryland and upgrade from Class A to Class B1 was denied.

Background

The R&O dealt with a number of "counter proposals" which once considered, resulted in an arrangement of allotments which is not mutually exclusive with the requested Channel 232B1 allotment. Thus, the requested allocation is still viable in the respect of being fully spaced.

Footnote 14 of the R&O appears to deny the proposal in part on the basis that a Channel 232B1 allotment is possible for St. Michaels and could be accomplished by the filing of a minor modification "one-step" upgrade application. Unfortunately, as pointed out in a previous Petition to Deny², the nearest Ch. 232B1 reference point³ to St. Michaels is located approximately 33 km south from the St. Michaels coordinates (see **Figure 1**)⁴. Considering that the usual FCC city coverage reference radius of a Class B1 facility is 23.2 km, a Ch. 232B1 allotment is not customarily possible for St. Michaels, Maryland. However, some assignments in the Table of Allotments were based on a Longley-Rice showing for city grade coverage. In the event that a Longley-Rice showing might be utilized in this case, a study was performed to determine the extent of 70 dBu coverage based on the alternate method. The Longley-Rice 70 dBu contour of a

¹A copy of the original granted license (02-11-2000) and the renewal notice (09-30-2003) are provided as attachments to this statement.

²See WDAC Radio Company petition referenced in MM Docket No. 92-291, RM-8133, DA-02-2696.

³The reference point is the same location discussed in the CWA Petition for Rule Making (RM-10842). The Channel 232B1 reference point is located at the coordinates 38-29-39 North Latitude and 76-13-21 West Longitude.

⁴**Figure 1** demonstrates the spacing limits of the three facilities which control the location of the Channel 232B1 reference point.

Engineering Statement
RESPONSE TO REPORT AND ORDER
(Page 2 of 2)

maximum Class B1 facility from the reference point falls short of the St. Michaels boundary by approximately 0.5 km.

Alternate City of License

Considering the very limited area available for Ch. 232B1, and considering that it has been demonstrated that a Ch. 232B1 allotment at the reference point serves the public interest in that it provides a preferable arrangement of allotments, Oxford, Maryland presents itself as a potential alternate principal community for Channel 232B1 utilizing the same reference point. **Figure 2** depicts the reference point with the resulting Class B1 coverage radius. As demonstrated, both Cambridge and Oxford, Maryland are completely encompassed by the 23.2 km radius.

Conclusion

CWA has petitioned the Commission to restore the allotment of Channel 232A from St. Michaels, MD to Cambridge, MD on the basis that neither a CP nor a license was issued for Channel 232A at St. Michaels, Maryland. As has been demonstrated in a previous statement, the public interest will be better served with a Channel 232B1 facility. As shown, a Channel 232B1 allotment would provide additional service to a net of 56,900 underserved persons, including 1,106 persons with only one full time service ("gray area"). In the event that Cambridge, Maryland is not acceptable as a city of license, Oxford, Maryland may be utilized as a possible alternate.

Qualifications

The undersigned hereby certifies that the foregoing statement was prepared by him or under his direction, and that it is true and correct to the best of his knowledge and belief. Mr. Clinton is an associate engineer in the firm of *Cavell, Mertz & Davis, Inc.*

Robert J. Clinton
December 23, 2005

Cavell, Mertz & Davis, Inc.
7839 Ashton Avenue
Manassas, VA 20109
(703) 392-9090

List of Attachments:

Figure 1	Channel 232B1 Spacing Limits
Figure 2	Channel 232B1 Coverage Radius

United States of America
FEDERAL COMMUNICATIONS COMMISSION
FM BROADCAST STATION LICENSE

Authorizing Official:

Official Mailing Address:

CWA BROADCASTING, INC.
35 OLD SOLOMONS ISLAND RD
ANNAPOLIS MD 21401

Brian J. Butler
Supervisory Engineer
Audio Division
Media Bureau

Grant Date: February 11, 2000

This license expires 3:00 a.m.
local time, October 01, 2003.

Facility Id: 14774

Call Sign: WINX-FM

License File Number: BLH-19990715KB

This License Covers Permit No.: BPH-19851028MJ

As Modified By Permit No.:BMPH-19990714IA

Subject to the provisions of the Communications Act of 1934, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this license, the licensee is hereby authorized to use and operate the radio transmitting apparatus herein described.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve the public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by Section 606 of the Communications Act of 1934.